Supreme Court, U. S.
FILED
DEC 18 1980

No. 80-120

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

ST. MARTIN EVANGELICAL LUTHERAN CHURCH, *et al.*,
Petitioners

v.

STATE OF SOUTH DAKOTA,
Respondent

On Writ of Certiorari to the Supreme Court of South Dakota

BRIEF OF THE STATES OF ALABAMA AND NEVADA AS AMICI CURIAE IN SUPPORT OF PETITIONERS

CHARLES A. GRADDICK
Attorney General
GEORGE COCORIS
Department of
Industrial Relations
649 Monroe St.
Montgomery, Alabama
36130

Attorneys for
State of Alabama

RICHARD H. BRYAN
Attorney General
JOHN A. FLANGAS
333 California Ave.
Reno, Nevada 89509

Attorneys for
State of Nevada

STUART PHILIP ROSS
PETER W. TREDICK
ALLEN R. SNYDER
PATRICIA R. AMBROSE
HOGAN & HARTSON
815 Connecticut Ave., N.W.
Washington, D.C. 20006
(202) 331-4500

Attorneys for States of
Alabama and Nevada

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTIONS PRESENTED

1. Whether the Supreme Court of South Dakota erred in accepting the United States Secretary of Labor's interpretation of section 3309 of the Federal Unemployment Tax Act to require the extension of state unemployment compensation laws to church elementary and secondary schools, when the plain language of section 3309(b)(1) exempts such schools from coverage, there is no evidence that Congress intended coverage of such schools, and coverage presents serious constitutional problems under the Religion Clauses of the First Amendment.

2. Whether the extension of state unemployment compensation laws to church elementary and secondary schools would result in excessive governmental entanglement with religion in violation of the Religion Clauses of the First Amendment.

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BRIEF OF THE STATES OF ALABAMA AND NEVADA AS AMICI CURIAE IN SUPPORT OF PETITIONERS

INTEREST OF THE STATES OF ALABAMA AND NEVADA

On October 31, 1979, the United States Secretary of Labor decided to withhold certification from the States of Alabama and Nevada under the Federal Unemployment Tax Act, 26 U.S.C. §§ 3301-3311 ("FUTA"), because they had failed to extend their unemployment compensation laws to employees performing services in church elementary and secondary schools. Alabama and Nevada sought review of the Secretary of Labor's ruling

in the United States Court of Appeals for the Fifth Circuit, contending that the Secretary's interpretation of FUTA was erroneous and constitutionally impermissible. On September 8, 1980, the Fifth Circuit set aside the Secretary of Labor's decision. *Alabama & Nevada* v. *Marshall*, 626 F.2d 366. A Petition for a Writ of Certiorari in that case was filed by the Secretary of Labor on December 8, 1980, No. 80-922. This Court had not yet acted upon the Petition at the time this brief was filed.

The decision of the Supreme Court of South Dakota in this case raises the same basic issue presented in the proceedings brought by the Secretary of Labor against Alabama and Nevada. This Court's resolution of the South Dakota case will thus likely determine whether Alabama and Nevada are entitled to certification under FUTA. A denial of certification would subject Alabama and Nevada to the loss of millions of dollars in federal grants for administration of their unemployment programs and would result in the denial of hundreds of millions of dollars in tax credits to private employers in those States. *See* 26 U.S.C. § 3302; 29 U.S.C. §§ 49-49k; 42 U.S.C. §§ 501-504.

Because of the serious impact that a denial of certification under FUTA would have upon the States and their citizens, Alabama and Nevada have a substantial interest in resolution of the issues raised by the decision of the Supreme Court of South Dakota.[1]

STATEMENT OF THE CASE

Prior to 1970, FUTA did not require coverage for employees of nonprofit organizations. In the Employment Security Amendments of 1970, Pub. L. No. 91-373, 84 Stat. 695 (hereinafter "1970 Amendments"), Congress required states to extend unemployment insurance

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[1] This brief is filed by the States of Alabama and Nevada as Amici Curiae pursuant to Rule 36.4 of the Rules of this Court.

coverage to employees of many nonprofit organizations as a condition to certification under the FUTA program. Among the exemptions provided by the 1970 Amendments for certain types of nonprofit employers was an exemption now contained in section 3309(b)(1) for service performed:

> in the employ of (A) a church or convention or association of churches, or (B) an organization which is operated primarily for religious purposes and which is operated, supervised, controlled, or principally supported by a church or convention or association of churches.

See 1970 Amendments, § 104, 84 Stat. 698. In addition, section 3309(b)(3) contained an exemption for service performed "in the employ of a school which is not an institution of higher education." *Id.* Thus, the language of two exemptions in the 1970 Amendments—section 3309(b)(1) and section 3309(b)(3)—was applicable to services performed in church elementary and secondary schools.

In 1976, Congress deleted the exemption contained in section 3309(b)(3), thereby extending coverage to services in the employ of public elementary and secondary schools [2] and nonprofit elementary and secondary schools not otherwise exempt from coverage.[3] Unemployment Compensation Amendments of 1976, Pub. L. No. 94-566, § 115, 90 Stat. 2670 (hereinafter "1976 Amendments"). Immediately after the deletion of the exemption in sec-

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[2] A major purpose of the 1976 Amendments was to require states to include under their unemployment compensation laws most services performed in the employ of state and local governments. *See* 1976 Amendments, § 115, 90 Stat. 2670. Deletion of the exemption in section 3309(b)(3) was thus necessary to extend coverage to employees of public elementary and secondary schools.

[3] The Senate Committee considering the 1976 Amendments stated that coverage would be required for nonprofit elementary and secondary schools "on the same basis as it is required for other nonprofit entities." S. Rep. No. 94-1265, 94th Cong., 2d Sess. 10 (1976).

tion 3309(b)(3), the United States Department of Labor issued a memorandum to all state unemployment agencies specifically addressing the effect of the 1976 Amendments on church-related schools. The memorandum stated that the amendments do "not affect the optional exclusion in 3309(b)(1)."[4] A few months later, the Department issued another memorandum to state unemployment agencies explaining that the test for deciding whether services are exempt from coverage under section 3309(b)(1) is simply whether the employer is a church or church-related organization as described in that section.[5]

More than a year after the latter memorandum from the Department, the United States Solicitor of Labor reassessed the Department's position concerning the applicability of the exemptions in section 3309(b)(1) to church elementary and secondary schools. The Solicitor noted that she would be "comfortable defending" either a position that 3309(b)(1) applies to church elementary and secondary schools, or a contrary "coverage" position.[6] Although the Solicitor explicitly recognized both the "silent legislative history" of the 1976 Amendments with respect to requiring coverage for church school employees, and the "possible constitutional involvement" inherent in the application of FUTA to church schools,[7] she recommended a "coverage" position because the Department's Employment and Training Administration "has

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[4] Supplement #1—Questions and Answers Supplementing *Draft Language and Commentary to Implement the Unemployment Compensation Amendments of 1976—P.L. 94-566* (Dec. 7, 1976), Appendix E to Petition for a Writ of Certiorari at A-63.

[5] Supplement #2—Questions and Answers Supplementing *Draft Language and Commentary to Implement the Unemployment Compensation Amendments of 1976—P.L. 94-566* (Feb. 2, 1977), Appendix F to Petition for a Writ of Certiorari at A-67.

[6] Memorandum for the Secretary from Carin Ann Clauss (Mar. 29, 1978) (hereinafter "Clauss Memorandum") (Joint Appendix [hereinafter "J.A."] A-52.)

[7] *Id.*

been informally indicating a coverage position to the state agencies [and a] change to a 'no coverage' position now . . . most likely will alienate state agencies most of whom have been supportive of coverage." [8] In making this recommendation, the Solicitor advised the Secretary that the then-anticipated decision in *NLRB* v. *Catholic Bishop*, 440 U.S. 490 (1979), "will hopefully provide guidance as to how far the government can legitimately extend [its] socio-economic goals into a church-related school." [9]

Following the Solicitor's recommendation, the Secretary announced for the first time, on April 18, 1978, that section 3309 of FUTA requires state unemployment compensation laws to cover services performed in church elementary and secondary schools.[10] The Department of Labor soon thereafter directed state unemployment agencies to inform all church elementary and secondary schools that the only services exempt from coverage under section 3309(b)(1)(A) are "those strictly church duties performed by church employees at the schools pursuant to their church responsibilities," and that the exemption in section 3309(b)(1)(B) has no applicability whatsoever to services performed in church elementary and secondary schools.[11]

Many states, including the State of South Dakota, acceded to the Secretary's instructions to cover employees in church elementary and secondary schools.[12] The South

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[8] *Id.* at A-51 - A-52.

[9] *Id.* at A-51.

[10] *See* In re Northwestern Lutheran Academy, 290 N.W.2d 845, 847 (S.D. 1980), *cert. granted sub nom.* St. Martin Evangelical Lutheran Church *et. al* v. State of South Dakota, No. 80-120 (U.S., Nov. 3, 1980).

[11] Unemployment Insurance Program Letter No. 39-78 (May 30, 1978) (hereinafter "UI Program Letter 39-78") (J.A. A-42.)

[12] Alabama originally took steps to comply with the Secretary of Labor's directive, but was enjoined by an Alabama circuit court from carrying out the Secretary's instructions. Nevada refused to

Dakota Circuit Court, however, set aside the state agency's determination that St. Martin's Evangelical Lutheran School and Northwestern Lutheran Academy were not exempt from coverage under the section of state law modeled upon section 3309(b)(1) of FUTA. The Supreme Court of South Dakota reversed that decision, *In re Northwestern Lutheran Academy, supra,* in a ruling which is contrary to the decision of the United States Court of Appeals for the Fifth Circuit in *Alabama & Nevada* v. *Marshall, supra,* and to the decisions of all other federal and state courts which to the knowledge of Alabama and Nevada have considered the Secretary of Labor's position.[13] This Court granted review of the decision of the Supreme Court of South Dakota to resolve the important issues raised by the Secretary of Labor's interpretation of FUTA.

SUMMARY OF ARGUMENT

In accepting the United States Secretary of Labor's interpretation of FUTA to require coverage of employees in church elementary and secondary schools, the Supreme Court of South Dakota compounded the Secretary's distorted analysis of both the statute and the Constitution. The Secretary of Labor's interpretation ignores plain and unambiguous language in section 3309(b)(1) exempting from coverage services performed in the employ of a church or a church-related organization operated primarily for religious purposes. Services in church elementary and secondary schools fit squarely within the language of these exemptions.

The interpretation of section 3309(b)(1) endorsed by the Supreme Court of South Dakota is without a shred of support in the legislative history of FUTA. Moreover, the interpretation is directly contrary to the well-established precedent of this Court that statutes must be

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follow the Secretary's directive on the basis that FUTA exempted services performed in church elementary and secondary schools.

[13] *See* pp. 9-10 & n.17, p. 14 & n.23, *infra.*

construed to avoid resolution of serious constitutional issues under the Religion Clauses of the First Amendment.

Finally, even if the terms of FUTA required coverage of church elementary and secondary school employees, such coverage would create the kind of excessive governmental entanglement with religion that the Religion Clauses of the First Amendment forbid. For these reasons, this Court should reverse the decision of the Supreme Court of South Dakota.

ARGUMENT

I. THE SUPREME COURT OF SOUTH DAKOTA ERRED IN ACCEPTING THE SECRETARY OF LABOR'S INTERPRETATION OF SECTION 3309 (b)(1) OF FUTA TO REQUIRE THE EXTENSION OF STATE UNEMPLOYMENT COMPENSATION LAWS TO SERVICES PERFORMED IN CHURCH ELEMENTARY AND SECONDARY SCHOOLS.

A. The Plain Language of Section 3309(b)(1) Exempts Church Elementary and Secondary School Employees from Coverage.

It is an elementary principle of statutory construction that when the words of a statute are clear, the plain language of the statute is controlling. *See TVA* v. *Hill*, 437 U.S. 153, 173, 184 n.29 (1978); *Ex Parte Collett*, 337 U.S. 55, 61 (1949); *Caminetti* v. *United States*, 242 U.S. 470, 485 (1917). The Supreme Court of South Dakota erred in failing to determine whether services performed in church elementary and secondary schools were within the plain language of section 3309(b)(1).[14]

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[14] Instead of focusing on the language of FUTA, the Supreme Court of South Dakota ruled that the "threshold question on appeal involves a determination of congressional intent." 290 N.W.2d at 847. The court then ruled that services in church elementary and secondary schools are not exempt under section 3309(b)(1)(B), and never ruled upon the applicability of section 3309(b)(1)(A). *See id.* at 848-49.

1. *Section 3309(b)(1)(A)*

The plain language of section 3309(b)(1)(A) refutes the Secretary of Labor's position, accepted by the Supreme Court of South Dakota, that services in church schools are not exempt under that section unless they constitute "those strictly church duties performed by church employees pursuant to their religious responsibilities within the school." *In re Northwestern Lutheran Academy*, *supra*, 290 N.W.2d at 847 (quoting Letter from Secretary of Labor Ray Marshall to The Most Reverend Thomas C. Kelly (Apr. 18, 1978)); *see Alabama & Nevada* v. *Marshall*, *supra*, 626 F.2d at 368. The language of section 3309(b)(1)(A) "plainly indicates that the exemption is contingent upon who the employer is . . . and not upon the type of services the employee is performing." *Id.* at 369. There is no doubt that services in a vast number of church elementary and secondary schools are performed in the direct employ of an entity which is a "church or convention or association of churches," and that such services are therefore exempt under section 3309(b)(1)(A).

In ruling that services in church elementary and secondary schools in Alabama and Nevada are performed "in the employ of a church" under section 3309(b)(1)(A), the Fifth Circuit recognized that "many of the church schools have no separate legal existence from their church; the school employees are hired, controlled, disciplined, and fired by church representatives and officials; school buildings are owned by the church; and school employees are paid with funds drawn from the church accounts." 626 F.2d at 368.[15] The schools in the

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[15] The Fifth Circuit's description of church elementary and secondary schools was based on stipulated facts agreed to by the Secretary of Labor and the States of Alabama and Nevada regarding the operation and organization of Baptist, Lutheran and Roman Catholic Church schools. *See* Alabama Exhibit (hereinafter "Ala. Exh.") A at ¶¶ 21, 23-26, 38-41, 57, 65, 68-69, 77 (Joint Appendix filed in Alabama & Nevada v. Marshall, *supra*, which is being lodged

instant case also fit squarely within the plain language of section 3309(b)(1)(A). St. Martin's Evangelical Lutheran School is not a separate legal entity from St. Martin Evangelical Church; members of the local church congregation supervise the school; and the school is completely financed by the local congregation. Appendix C to Petition for a Writ of Certiorari at A-38, ¶ XII. Northwestern Lutheran Academy is not a separate legal entity from the Wisconsin Evangelical Lutheran Synod; the Synod controls the operation and policy of the Academy; and the Synod is the principal source of the Academy's support. *Id.* at A-39, ¶¶ XV, XVI.

The foregoing description of the relationship between churches and their elementary and secondary schools clearly demonstrates that persons performing services in many such schools are employed by a "church or convention or association of churches," and thus are within the plain language of section 3309(b)(1)(A).[16] Not surprisingly, all federal and state courts which to the knowledge of Alabama and Nevada have considered the

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with this Court in No. 80-922 [hereinafter "Ala./Nev. J.A."] 51-53, 55-56, 60, 63-65); Nevada Exhibit (hereinafter "Nev. Exh.") A at ¶¶ 2-9, 27-29, 33-35 (Ala./Nev. J.A. 93-95, 98-99).

[16] This conclusion is in accord with judicial precedent recognizing that church elementary and secondary schools form an "integral part" of their governing church. *See, e.g.*, Surinach v. Pesquera de Busquets, 604 F.2d 73, 76 (1st Cir. 1979); McCormick v. Hirsch, 460 F. Supp. 1337, 1353 (M.D. Pa. 1978). *See also* Lemon v. Kurtzman, 403 U.S. 602, 616 (1971) (parochial schools constitute "'an integral part of the religious mission of the Catholic Church'").

The Secretary of Labor in the past has summarized his position on section 3309(b)(1)(A), stating "church-related schools are not 'churches' and therefore their employees are not exempt." Respondent's Brief at 26, filed in Alabama & Nevada v. Marshall, *supra*, which is being lodged with this Court in No. 80-922. The question under section 3309(b)(1)(A), however, is *not* whether church schools are churches, but whether persons performing services in church schools are performing those services "in the employ of a church or convention of association of churches."

issue have held that the exemption in section 3309(b)(1)(A) is applicable to church elementary and secondary school employees.[17]

The Secretary of Labor has contended that the term "church" in section 3309(b)(1)(A) means a physical house of worship and that therefore the only exempt services are "those strictly church duties performed by church employees at the school[s] pursuant to their church responsibilities." *Alabama & Nevada* v. *Marshall*, *supra*, 626 F.2d at 368 (quoting UI Program letter 39-78).[18] The Secretary's interpretation completely fails to recognize that a physical building cannot "employ" anyone,[19] and also ignores the fact that section 3309(b)(1)

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[17] *See* Alabama & Nevada v. Marshall, *supra*, 626 F.2d at 368-69; Grace Brethren Church v. California, No. CV 79-93 MRP, slip op. at 7-8 (C.D. Cal., Sept. 21, 1979) (granting preliminary injunction), *appeal dismissed*, No. 79-3763 (9th Cir., July 24, 1980), *supplemental opinion*, slip op. at 2 (C.D. Cal., June 2, 1980), *appeal dismissed*, No. 79-3784 (9th Cir., July 21, 1980); Lutheran Church-Missouri Synod v. Bowling, No. 501-78, slip op. at 4 (Ill. App. Ct., Oct. 1, 1980), *appeal docketed*, No. 54249 (Ill. Sup. Ct., Dec. 15, 1980); Grace Lutheran Church v. North Dakota Empl. Sec. Bur., Civ. No. 9719, slip op. at 8 (N.D., June 20, 1980); Roman Catholic Church v. Louisiana, No. 13,541, slip op. at 3-4 (La. Ct. App., June 9, 1980); Catholic Diocese v. Labor & Indus. Rel. Comm., No. CV 179-745cc, slip op. at 1-2 (Mo. Cir. Ct., Mar. 28, 1980), *appeal docketed*, No. 31780 (Mo. Ct. App., Apr. 28, 1980); Trinity Evangelical Lutheran Church v. Department of Indus. Rel., No. CV 78-500325 McR, slip op. at 17 (Ala. Cir. Ct., Jan. 29, 1979), *appeal dismissed*, No. 78-440 (Ala. Sup. Ct., May 31, 1979); *see also* Fischer v. Board of Appeals, No. 1979/1230/19724 (Balt., Md., City. Ct., May 13, 1980) (notice of appeal filed Aug. 14, 1980); Begley v. Employment Sec. Dept. No. 78-CVS-8531 (N.C. Super. Ct., Mar. 4, 1980) (notice of appeal filed Mar. 6, 1980).

[18] The Secretary has defined "church duties" as "the administration of sacerdotal functions and the conduct of religious worship." *See* Respondent's Brief at 18-21, 25-26, filed in Alabama & Nevada v. Marshall, *supra*, which is being lodged with this Court in No. 80-922.

[19] The dissenting opinion of Justice Henderson of the Supreme Court of South Dakota recognized this fact, stating, "[i]f the term 'church' in isolation is ambiguous, the context of this statute abso-

(A) contains no indication that the exemption is dependent upon the nature of the services performed. Moreover, as the Fifth Circuit recognized in rejecting the Secretary of Labor's interpretation of section 3309(b)(1)(A):

> [T]he plain meaning of "church" requires a definition as something qualitatively greater than the physical building of worship and, at a minimum, the term encompasses the legal entity commonly referred to as a church. The Secretary would avoid the legal consequences of this definition by excluding the very people which comprise a church as an entity and perform its functions. For this court to adopt such a limited definition would be for us to ignore the historic function of churches and defy the definition of the word as used in our vocabulary. [*Id.* at 369.]

Despite the clear applicability of section 3309(b)(1)(A) to church elementary and secondary school employees, the Supreme Court of South Dakota never even addressed whether services in schools such as St. Martin's Evangelical Lutheran School and Northwestern Lutheran Academy are exempt under the language of that section. This Court should reverse the decision of the Supreme Court of South Dakota and hold that the plain language of section 3309(b)(1)(A) applies to all services performed in church elementary and secondary schools which are not separate legal entities from their respective churches.

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lutely forecloses equation with a physical plant." 290 N.W.2d at 854.

The Secretary's interpretation of the word "church" to mean a physical house of worship rather than a legal entity is inconsistent not only with the manner in which the word is used in FUTA, but also with its use in other federal statutes. *See, e.g.*, Employment Retirement Income Security Act of 1974, 29 U.S.C. §§ 1002(33)(A), (B), 1003(b)(2) (dealing with retirement plans of employees of churches); 26 U.S.C. § 6033(a)(2)(A) (churches excluded from filing information income tax returns); 26 U.S.C. § 7605(c) (restrictions on examining books of accounts of churches).

2. Section 3309(b)(1)(B)

Services performed in church elementary and secondary schools may also be exempt from coverage under the plain language of section 3309(b)(1)(B), which applies to services performed in the employ of "an organization which is operated primarily for religious purposes and which is operated, supervised, controlled, or principally supported by a church or convention or association of churches."[20] This Court has consistently acknowledged that church elementary and secondary schools exist for a primarily religious purpose. In *Meek* v. *Pittenger*, 421 U.S. 349 (1975), for example, the Court explained:

> The very purpose of many of those schools is to provide an integrated secular and religious education; the teaching process is, to a large extent, devoted to the inculcation of religious values and belief. . . . "[T]he secular education those schools provide goes hand in hand with the religious mission that is the only reason for the schools' existence. Within the institution, the two are inextricably intertwined." [*Id.* at 366 (citations omitted).]

See also NLRB v. *Catholic Bishop*, *supra*, 440 U.S. at 503 (quoting from *Lemon* v. *Kurtzman*, *supra*, 403 U.S. at 616, referring to the "substantial religious character of these church-related schools").

The record in this case unquestionably demonstrates that church elementary and secondary schools have a primarily religious purpose. It is undisputed that the Wisconsin Evangelical Lutheran Synod believes that "training of . . . youth involves both education and religion and that the two are so closely interwoven they cannot be separated." Appendix C to Petition for a

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[20] Although Alabama and Nevada maintain that services in church elementary and secondary schools with no separate corporate existence from their church are exempt under section 3309(b)(1)(A), services in such schools, along with services in separately incorporated church schools, are also entitled to exemption under section 3309(b)(1)(B).

Writ of Certiorari at A-36, ¶ III. The Synod's school system is maintained in order to extend and conserve the doctrine and practice of the Evangelical Lutheran Church. *Id.* at A-36, ¶ II. All courses at St. Martin Evangelical Lutheran School and at Northwestern Lutheran Academy are taught from a religious viewpoint based on scriptural convictions held by members of the Synod. *Id.* at A-39, ¶ XIV, A-40, ¶ XIX. The Academy serves the special purpose of recruiting and providing training for future workers in the church preaching and teaching ministry. *Id.* at A-39, ¶ XVI.[21]

The record also demonstrates that church elementary and secondary schools are "operated, supervised, controlled or principally supported by a church or convention or association of churches," thus meeting the second part of the test for exemption under section 3309(b)(1)(B). *See* Appendix C to Petition for a Writ of Certiorari

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[21] The United States Department of Labor stipulated to similar facts in Alabama & Nevada v. Marshall, *supra*, demonstrating the primarily religious purpose of elementary and secondary schools of the Baptist, Lutheran and Catholic faiths. For example, the Department stipulated that Baptist churches, "in observance of the commands of the Holy Bible, as a matter of firm religious conviction and religious practice, operate all of their . . . ministries [which include their elementary and secondary schools] for the ultimate purpose of spreading the Gospel message concerning the salvation of man in and through the Lord Jesus Christ." Ala. Exh. A at ¶¶ 19, 20 (Ala./Nev. J.A. 51). The Department stipulated that "[t]he Roman Catholic Church founded an alternative elementary and secondary school system in the Diocese of Reno-Las Vegas, as elsewhere, for religious reasons," and that "[t]he fundamental mission of [such schools] is to transmit the Roman Catholic faith from generation to generation and instill Catholic values in their students." Nev. Exh. A at ¶ 11 (Ala./Nev. J.A. 95); *see* Ala. Exh. A at ¶ 77 (Ala./Nev. J.A. 65). The record also demonstrates that to achieve their primarily religious purpose, church elementary and secondary schools in Alabama and Nevada mandate participation in religious instruction and religious services, and teach all courses with religious content. *See* Ala. Exh. A at ¶¶ 27-28, 33-34, 74-75, 77 (Ala./Nev. J.A. 53, 54, 65); Nev. Exh. A at ¶¶ 10, 14, 16, 30, 32 (Ala./Nev. J.A. 95, 96, 98, 99).

at A-38, ¶ XII (St. Martin's School "is 100% financed by the local congregation"), A-39, ¶ XV (the "Synod is the principal source of support for" the Academy).[22] For these reasons, church elementary and secondary schools are plainly exempt under the provisions of section 3309 (b) (1) (B) of FUTA.[23]

B. There Is No Evidence That Congress Intended To Require the Extension of State Unemployment Compensation Laws to Services Performed in Church Elementary and Secondary Schools.

The congressional committees considering the 1970 Amendments to FUTA engaged in very limited discussion of section 3309(b) (1). The committees explained that this section

> excludes services of persons where the employer is a church or convention or association of churches, but does not exclude certain services performed for an organization which may be religious in orientation unless it is operated primarily for religious purposes and is operated, supervised, controlled, or principally supported by a church (or convention or association of churches). Thus, the services of the janitor of a church would be excluded, but services of a janitor for a separately incorporated college, although it may be church related, would be covered. A college devoted primarily to preparing students

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[22] Similarly, the record in Alabama & Nevada v. Marshall, *supra*, demonstrated that church elementary schools are operated, supervised, controlled and principally supported by a church. *See* Ala. Exh. A at ¶¶ 19, 22-25, 35, 51, 64-65, 77 (Ala./Nev. J.A. 51-55, 58-59, 62-63, 65); Nev. Exh. A at ¶¶ 1, 4, 7-9, 19, 34-35 (Ala./Nev. J.A. 93-95, 97, 99).

[23] Several courts have so held. *See* Grace Brethren Church v. California, *supra*, slip op. at 3 (supplemental opinion); Roman Catholic Church v. Louisiana, *supra*, slip op. at 3; Catholic Diocese v. Labor and Indus. Rel. Comm., *supra*, slip op. at 1-2; Employment Division v. Archdiocese of Portland, 42 Ore. App. 421, 600 P.2d 926, 927-28 (1979); Trinity Evangelical Lutheran Church v. Department of Indus. Rel., *supra*, slip op. at 17-19.

> for the ministry would be exempt, as would be a novitiate or a house of study training candidates to become members of religious orders. On the other hand, a church related (separately incorporated) charitable organization (such as, for example, an orphanage or a home for the aged) would not be considered under this paragraph to be operated primarily for religious purposes. [S. Rep. No. 91-752, 91st Cong., 2d Sess. 48-49 (1970); H. Rep. No. 91-612, 91st Cong., 1st Sess. 44 (1969).]

These statements demonstrate that Congress intended the exemptions in section 3309(b)(1) to depend upon the nature of the employing organization. If the employer is a church or church-related organization operated primarily for religious purposes, all services for that employer are exempt under section 3309(b)(1)(A). Moreover, by referring to "church related" organizations within section 3309(b)(1)(B) as "separately incorporated" organizations, Congress recognized that services performed for organizations with no corporate existence apart from a church are performed in the employ of the church and are thus exempt from coverage under section 3309(b)(1)(A). The congressional reports further support the proposition that *any* type of employment for a church or qualifying church-related organization, even in the capacity of a janitor, is exempt from coverage. The legislative history of the 1970 Amendments thus is fully consistent with the plain language of sections 3309(b)(1)(A) and (B).

The South Dakota Supreme Court mistakenly assumed that the congressional committees' discussion of church-affiliated colleges in connection with the 1970 Amendments would be applicable to church elementary and secondary schools. *See* 290 N.W.2d at 848.[24] No issue

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[24] The South Dakota Supreme Court's reliance on the general statement by the House Ways and Means Committee that it was concerned about the needs of employees of nonprofit religious, charitable, educational and humane organizations, *see* 290 N.W.2d

involving church elementary and secondary schools was before the committees in connection with the 1970 Amendments, however, because all schools below the college level were at that time exempt. *See* p. 3, *supra*. Moreover, many decisions of this Court and lower courts have recognized that while advancement of religion may not be a substantial purpose of church-affiliated colleges, it is a primary purpose of church elementary and secondary schools. *See Tilton* v. *Richardson*, 403 U.S. 672, 687 (1971); *see also Roemer* v. *Board of Public Works*, 426 U.S. 736, 755-58, 765 (1976); *Meek* v. *Pittenger*, *supra*, 421 U.S. at 366; *Americans United for Separation of Church & State* v. *Bubb*, 379 F. Supp. 872, 891 (D. Kan. 1974).

The legislative history of the 1976 Amendments also lacks any evidence that Congress intended to require coverage for church elementary and secondary schools. There is not one reference to churches or church schools in the hundreds of pages of reports and debates. It is simply incomprehensible that Congress would have intended the 1976 Amendments to have such far-reaching significance for virtually every major church group in the country without a single statement on the issue in the legislative history.

The ambiguous fragments of legislative history of the 1976 Amendments relied on by the Supreme Court of South Dakota do not support its decision. The isolated figure in a table in the Senate Report indicating that the 1976 Amendments would provide coverage for an additional 242,000 employees of nonprofit organizations, *see* S. Rep. No. 94-1265, *supra*, at 10, was not accompanied by any indication that it included employees in church schools, and there is no reason to believe Con-

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at 848 (quoting H. Rep. No. 91-612, 91st Cong., 1st Sess. 11 (1969)), is misplaced. The Committee's statement is of no assistance in interpreting the exemptions from coverage that Congress actually enacted for certain types of nonprofit employers, including religious organizations.

gress understood the number to include such employees. For these reasons, the Administrative Law Judge in the proceedings before the Department of Labor in *Alabama & Nevada* v. *Marshall*, *supra*, emphatically rejected the Secretary of Labor's reliance on this figure, stating:

> [T]he Department's reliance on a reference in the legislative history to the figure of 242,000 employees in all non-profit elementary and secondary schools as evidence of Congressional intent to cover employees of church schools is wholly misplaced. Department testimony in this case reflects that the figure is without meaning unless accompanied by the raw data, and admittedly, the record is silent as to Congressional understanding of the figure or the supporting data. In any event, a legislative cloak embracing integral church functions can hardly be woven with such a slender thread.[25]

Moreover, the suggestion that the repeal of section 3309(b)(3) would have been meaningless unless services in church elementary and secondary schools were intended to be covered is spurious. Repeal of the exclusion in section 3309(b)(3) was necessary to assure that coverage was extended to employees in public elementary and secondary schools, who vastly outnumber employees in church elementary and secondary schools. *See* note 2, *supra*.[26]

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[25] Recommended Decision dated Oct. 11, 1979, at 8 (Ala./Nev. J.A. 8).

[26] The South Dakota Supreme Court relied on a remark in a House Report, *see* H. Rep. No. 94-755, 94th Cong., 1st Sess. 56 (1975), which it interpreted as suggesting that services for all educational institutions would be covered as a result of the 1976 Amendments. However, this remark is ambiguous with respect to whether only public institutions were being discussed and is admittedly overbroad, as even the Secretary of Labor would admit that some religious educational institutions, *i.e.*, seminaries, are exempt. *See* In re Northwestern Lutheran Academy, *supra*, 290 N.W.2d at 848. In any event, there is no evidence that the comment was directed at church schools.

As the foregoing analysis reveals, the legislative history of the 1970 and 1976 Amendments is fully consistent with the plain language of section 3309(b)(1) and supplies no basis for the distorted interpretation of FUTA adopted by the Secretary of Labor and accepted by the Supreme Court of South Dakota.

C. The Secretary of Labor's Interpretation of Section 3309(b)(1) Is Not Entitled to Any Deference.

The Supreme Court of South Dakota ruled that the Secretary of Labor's interpretation of section 3309(b)(1) is entitled to "great deference." 290 N.W.2d at 849. However, the doctrine according deference to the construction of a statute by the agency charged with its administration is not applicable in this case for several reasons.

First, the Secretary of Labor's interpretation of FUTA to require coverage of church elementary and secondary school employees does not represent a contemporaneous construction of the 1976 Amendments. *See General Electric Co.* v. *Gilbert*, 429 U.S. 125, 142 (1976). As previously discussed, the Department of Labor issued an interpretation of the 1976 Amendments immediately after the repeal of section 3309(b)(3), which stated that the repeal did not affect the optional exclusion for church elementary and secondary schools in section 3309(b)(1). *See* pp. 3-4, *supra*. The Secretary's present interpretation, first announced in 1978, represents an agency *reversal* of its *contemporaneous* interpretation of the statute.

Second, as the foregoing analysis demonstrates, the Department of Labor's position has not been constant. *See Alabama & Nevada* v. *Marshall*, 626 F.2d at 368 (referring to "over a year of equivocation" by the Secretary). Such lack of consistency negates any respect that might otherwise be due to an administrative interpretation. *See General Electric Co.* v. *Gilbert*, 429 U.S. at 142.

Third, the Solicitor of Labor's memorandum to the Secretary, *see* pp. 4-5, *supra*, strongly suggests that the Secretary's present position was prompted by fear of alienating state agencies, and was impermissibly influenced by political factors extraneous to relevant statutory considerations. *See D.C. Federation of Civic Associations* v. *Volpe*, 459 F.2d 1231, 1246 (D.C. Cir. 1971), *cert. denied*, 405 U.S. 1030 (1972). Thus, the validity of the reasoning of the Secretary's interpretation is doubtful. *General Electric Co.* v. *Gilbert*, *supra*, 429 U.S. at 142 (quoting from *Skidmore* v. *Swift & Co.*, 323 U.S. 134, 140 (1944)).

Finally, the most fundamental obstacle to according any deference to the Secretary's interpretation is that it contradicts the plain language of section 3309(b)(1) and lacks any support from the pertinent legislative history. *See General Electric Co.* v. *Gilbert*, *supra*, 429 U.S. at 145; *Morton* v. *Ruiz*, 415 U.S. 199, 237 (1974); *Social Security Board* v. *Nierotko*, 327 U.S. 358, 369-70 (1946).

For all of the foregoing reasons, the Supreme Court of South Dakota erred in holding that the Secretary's interpretation is entitled to deference.

D. The Interpretation of Section 3309(b)(1) Adopted by the Supreme Court of South Dakota Must Be Rejected Because It Demands Resolution of Difficult and Sensitive Questions Under the First Amendment to the Constitution Without an "Affirmative Intention of Congress Clearly Expressed" To Cover Church Schools.

In *NLRB* v. *Catholic Bishop*, *supra*, this Court held that when an agency's interpretation of a statute gives rise to serious constitutional questions under the Religion Clauses of the First Amendment, it must be rejected unless it represents "the affirmative intention of the Congress clearly expressed." 440 U.S. at 500-01. Only when such unmistakable evidence of congressional

intent exists should a court determine whether a proposed interpretation of the statute is impermissible on constitutional grounds.

In the *Catholic Bishop* case, the Court determined that the NLRB's assertion of jurisdiction over church schools presented a significant risk of excessive governmental entanglement with religion. *Id.* at 497, 502. The Court then examined the legislative history of the National Labor Relations Act to determine whether there was an "affirmative intention of Congress clearly expressed" to extend jurisdiction to church schools. *Id.* at 502-04. The Court found no clear evidence of such intention and ruled that the NLRB's interpretation of its statutory jurisdiction must therefore be set aside. *Id.* at 504-07.

As the Solicitor of Labor previously recognized, *see* p. 5, *supra*, the *Catholic Bishop* decision squarely applies here. This Court's ruling in that case demands that the Secretary of Labor's interpretation of section 3309 of FUTA be rejected. As we will show in Section II, below, there is "abundant evidence," *NLRB* v. *Catholic Bishop*, *supra*, 440 U.S. at 507, that the extension of state unemployment compensation laws to church elementary and secondary schools would result in excessive church-state entanglement and thus would violate the Religion Clauses of the First Amendment. Moreover, as already demonstrated, the fragments of legislative history relied on by the Secretary of Labor and the Supreme Court of South Dakota completely fail to reveal an "affirmative intention of Congress clearly expressed" to require coverage of church elementary and secondary schools.

II. THE EXTENSION OF STATE UNEMPLOYMENT COMPENSATION LAWS TO SERVICES PERFORMED IN CHURCH ELEMENTARY AND SECONDARY SCHOOLS WOULD RESULT IN EXCESSIVE GOVERNMENTAL ENTANGLEMENT WITH RELIGION IN VIOLATION OF THE FIRST AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION.

Even if the Secretary of Labor's interpretation of FUTA were correct, the Court would be required to reverse the decision of the Supreme Court of South Dakota on constitutional grounds. The unavoidable result of the extension of state unemployment compensation laws to church elementary and secondary schools would be continuing, pervasive state supervision of, and conflict with, church schools and their sponsoring churches.

In order to comply with the Secretary's decision, state unemployment agency officials would be required to undertake religious-oriented inquiries in ascertaining what services at church schools are "strictly church duties," and in conducting hearings into the reasons for a church school employee's termination of employment. Church officials would be forced to assume extensive recordkeeping and reporting responsibilities with regard to church and school activities. State officials would be required to evaluate church school compliance with the regulatory scheme and to correct any perceived deviation therefrom through elaborate enforcement powers. These inevitable consequences of the interpretation of FUTA adopted by the Secretary of Labor and endorsed by the Supreme Court of South Dakota would constitute excessive governmental entanglement with religious groups, in violation of the Religion Clauses of the First Amendment and, as applied to the states, the Fourteenth Amendment.

The entanglement doctrine was first formulated by this Court in *Walz* v. *Tax Commission*, 397 U.S. 664 (1970). In that case, the Court stated that enactments which did not actually aid or support religion were none-

theless violative of the Establishment Clause if the legislation at issue resulted in "official and continuing surveillance" of church activities by state officials charged with enforcing statutory standards. *Id.* at 675.

Since *Walz*, the Court has employed the excessive entanglement analysis in numerous cases involving state aid to sectarian schools. *See, e.g., Lemon* v. *Kurtzman, supra; Tilton* v. *Richardson, supra; Meek* v. *Pittenger, supra; Wolman* v. *Walter*, 433 U.S. 229 (1977). The Court has expressed disapproval of programs which necessitate governmental classification of church school activities as religious or nonreligious, which inject government into issues of religious discipline or into disagreements between teachers and religious authorities, or which create a sustained or detailed administrative relationship between government and church entities for enforcement of statutory or administrative standards. *See Committee for Public Education* v. *Regan*, 100 S. Ct. 840, 849-50 (1980); *Lemon* v. *Kurtzman, supra*, 403 U.S. at 618-20; *Walz* v. *Tax Commission, supra*, 397 U.S. at 657; *see also McCormick* v. *Hirsch, supra*, 460 F. Supp. at 1352.[27]

Federal appellate courts have applied the entanglement doctrine as developed by this Court to invalidate attempts to include church schools in regulatory schemes similar to that involved in the instant case. In *Catholic Bishop* v. *NLRB*, 559 F.2d 1112 (7th Cir. 1977), *aff'd on other grounds*, 440 U.S. 490 (1979), the Seventh Circuit held that the NLRB's proposed assumption of

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[27] A statute is invalid under the First Amendment if it creates "a reasonable likelihood or possibility of entanglement." Catholic Bishop v. NLRB, 559 F.2d 1112, 1126 (7th Cir. 1977) (collecting cases), *aff'd on other grounds*, 440 U.S. 490 (1979). *See also* McCormick v. Hirsch, *supra*, 460 F. Supp. at 1357. Moreover, the burden is upon the government to show that implementation of a regulatory scheme will *not* ultimately entangle it excessively in the affairs of a religion. Surinach v. Pesquera de Busquets, *supra*, 604 F.2d at 75-76.

jurisdiction over church elementary and secondary schools would violate the First Amendment because of the likelihood that it would propel the Board into analyses of essentially religious employment decisions. The court was also fearful that the prospect of NLRB review of employment decisions would chill the employers' free exercise rights. *Id.* at 1123-24. In rejecting the NLRB's assertion of jurisdiction over church schools, the court of appeals noted the unfortunate irony—also present in the instant case—that the government's position "is cruelly whip-sawing [church] schools by holding that institutions too religious to receive governmental assistance are not religious enough to be excluded from its regulation." *Id.* at 1119.

In *Surinach* v. *Pesquera de Busquets, supra,* the First Circuit invalidated a similar regulatory involvement in church elementary and secondary school affairs. The court refused to permit a government investigation of the costs of church schools as part of a broader investigation of the rising cost of education, stating that the proposed action "constitutes a palpable threat of state interference with the internal policies and beliefs of these church related schools." 604 F.2d at 76-77. The court recognized that the government's "ongoing powers necessary to ensure compliance with its orders and regulations, from compelling the keeping of records and the providing of testimony to the continuing inspection of papers and physical facilities . . . [have] the 'self-perpetuating and self-expanding propensities' which have alerted courts to an increased danger of an unconstitutional degree of entanglement." *Id.* at 78.

There is no doubt that the extension of state unemployment compensation laws to church elementary and secondary schools would create an intolerable degree of entanglement, as it has been defined by judicial authority. Under the Secretary's interpretation of section 3309(b)(1)(A), the critical factor in determining whether an employee's services are covered is the extent to which

those services constitute "strictly church duties performed . . . pursuant to church responsibilities." [28] Thus, in proceedings to determine the amount of taxes due from church schools, and in proceedings on individual claims for unemployment benefits, state officials would continuously be required to analyze the services of individual church school employees and to determine whether they do or do not constitute religious activity. For this reason, the United States District Court for the Central District of California condemned the classification required by the Secretary's interpretation, stating that

> the inquiry necessarily involved in policing the application of the exemption, "puts a public investigator into every classroom and entails a pervasive monitoring of these church agencies by the secular authorities." . . . Yet without such monitoring, there would be no way of making the determinations required by the Secretary's interpretation of § 3309. [*Grace Brethren Church* v. *California, supra*, slip op. at 11 (Sept. 21, 1979 decision) (quoting *Lemon* v. *Kurtzman, supra*, 403 U.S. at 627).[29]

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[28] UI Program Letter No. 39-78 (J.A. A-42). The Department of Labor has taken the position that if one-half or less of an employee's services are "strictly church duties," unemployment coverage must be provided for the employee. *See id.* (J.A. A-43).

[29] In *Grace Brethren* the court described one state auditor's attempt to comply with the Department of Labor's directive:

> The auditor, after asking detailed questions as to what transpired in the music class, the "nature center" and the "block center," ended by classifying music as strictly religious and the nature and block centers as both religious and secular. There is even a list of exempt employees which was given to one of the church schools at the conclusion of an audit. Among those listed was the church custodian. . . . One wonders how the auditor will determine the percentage of the custodian's time spent on the church versus the church school since the same buildings are frequently used for both purposes. [Slip op. at 20 n.11 (Sept. 21, 1979 decision).]

The South Dakota Supreme Court's statement that "the simple determination of the amount of time spent by employees working

The monitoring and oversight of services performed by church school employees to determine "whether different school activities are religious in character" unquestionably render the Secretary of Labor's interpretation of FUTA unconstitutional. *Committee for Public Education* v. *Regan*, *supra*, 100 S. Ct. at 849.[30]

Moreover, the extension of state unemployment compensation laws to church elementary and secondary schools would inject government into controversies of religious discipline and doctrine, necessitating inquiry into the religious understandings, motivations and good faith of church authorities responsible for operating church schools. The issue "most frequently disputed" in connection with claims for unemployment compensation is the reason for termination of employment. *California Department of Human Resources Development* v. *Java*, 402 U.S. 121, 126 (1971). This issue is extensively litigated because state laws uniformly provide for denial of benefits to employees who were discharged for "misconduct in connection with their work" or who voluntarily left employment "without good cause." [31]

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in respondents' schools, as opposed to its churches, does not foster entanglement of constitutional dimensions," 290 N.W.2d at 852, erroneously assumes that the critical factor for determining eligibility for coverage is the physical location where particular services are performed. The Secretary of Labor's own pronouncements have recognized that activities may be "strictly church duties" even though performed in school buildings. *See* Supplement #5—Questions and Answers Supplementing *Draft Language and Commentary to Implement the Unemployment Compensation Amendments of 1976—P.L. 94-566* (Nov. 13, 1978) (Ala./Nev. J.A. 135).

[30] In *Regan* the Court upheld a limited state program for reimbursing certain state-imposed testing costs to church schools, noting that the program did not require the state "to monitor the day-to-day activities of the teaching staff, to engage in onerous, direct oversight, or to make on-site judgments from time to time as to whether different school activities are religious in character." 100 S. Ct. at 849 (quoting from the opinion of the district court).

[31] *See, e.g.*, Ala. Code §§ 25-4-78(2), (3); Nev. Rev. Stats. §§ 612.380, 612.385.

In cases involving dismissal of a teacher for conduct or teachings at variance with church doctrine, the teacher would have the right to demand that the underlying reason for the termination of employment be examined by the state unemployment agency. Federal law requires states to provide an "[o]pportunity for a fair hearing, before an impartial tribunal, for all individuals whose claims for unemployment compensation are denied." 42 U.S.C. § 503(a)(3). Hearings in such cases would necessarily involve review of religiously-motivated employment decisions of church officials, as well as inquiry into matters of church doctrine and practice.

A Department of Labor expert has acknowledged that evidence at such a hearing would consist of testimony from the teacher and church authorities concerning what they reasonably understood the doctrine of the church to be.[32] In addition, the state hearing officer would be required to appraise the credibility of the teacher and the church authorities [33] and to determine whether the teacher knowingly violated church doctrine.[34] Such hearings on unemployment claims would clearly violate constitutional prohibitions against excessive governmental entanglement with religion.

In advising the Secretary of Labor prior to this Court's decision in *NLRB* v. *Catholic Bishop*, *supra*, that the extension of state unemployment compensation laws to church elementary and secondary schools would not violate the First Amendment, the Solicitor of Labor argued:

> If a church official were to contend that an employee was in fact fired for espousing heretical views, the claims examiner would be limited to a determination whether the employer's alleged reason for the dis-

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[32] Transcript of Administrative Hearing in Alabama & Nevada v. Marshall, *supra*, dated Sept. 26, 1979, at 108-10, 113-14, 119-20 (Ala./Nev. J.A. 151-53, 156-57, 162-63).

[33] *Id.* at 113-14 (Ala./Nev. J.A. 156-57).

[34] *Id.* at 108 (Ala./Nev. J.A. 151).

> charge was the actual one. Once it is determined that the employee had not been removed or disciplined in an effort to interfere with rights created by the UI program, the inquiry would be at an end. If the employee had been discharged because of the employer's belief that the employee was unqualified to teach in a parochial school, the validity of that belief as a part of church doctrine would play no part in the decision. Concern by church officials that their decisions would be compromised by potential oversight in the claims process is speculative at best. . . .[35]

In the *Catholic Bishop* case, the Court disapproved a virtually identical inquiry into the religious motivations and understandings of church authorities who claim that certain employment actions were mandated by their religious creeds. The Court stated:

> [I]t is already clear that the Board's actions will go beyond resolving factual issues. The Court of Appeals' opinion refers to charges of unfair labor practices filed against religious schools. 559 F.2d, at 1125, 1126. The court observed that in those cases the schools had responded that their challenged actions were mandated by their religious creeds. The resolution of such charges by the Board, in many instances, will necessarily involve inquiry into the good faith of the position asserted by the clergy-administrators and its relationship to the school's religious mission. It is not only the conclusions that may be reached by the Board which may impinge on rights guaranteed by the Religion Clauses, but the very process of inquiry leading to findings and conclusions. [440 U.S. at 502.]

The same potential for chilling sensitive employment decisions of church authorities that existed in *Catholic Bishop* exists in this case as well. Church officials will be confronted with a choice of forgoing their right to discharge dissident teachers or of doing so "at the risk of

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[35] Clauss Memorandum (J.A. A-55 - A-56).

a protracted and expensive . . . proceeding . . . which would certainly in part involve the Church's religious policies and beliefs." *Catholic Bishop* v. *NLRB*, *supra*, 559 F.2d at 1124.

In addition to the particularly offensive types of official surveillance discussed above, the adoption of the Secretary's interpretation of FUTA would result in church school authorities being required to keep work records, open at any time to state inspection, on all persons performing service in the schools; to answer subpoenas issued by state officials in connection with claims for benefits as well as general administrative matters, under penalty of misdemeanor conviction or contempt citation; to respond to all claims for benefits with facts affecting the claim; and to participate in hearings required in conjunction therewith. The responsible state unemployment agencies will be required to make periodic determinations of the amount of unemployment contributions (or reimbursement) properly due from church schools. In so doing, the state agencies will be obligated to review church school records and to undertake an analysis of services performed in the schools. State agencies will be empowered to enforce the various obligations of church school authorities under the unemployment insurance program by such legal proceedings as the commencement of civil actions, property attachment, levies of assessment, liens on church assets, garnishment proceedings, and criminal misdemeanor prosecutions.[36] Such administrative entanglement between church school authorities and state agencies is far more severe than that which has been invalidated under the entanglement doctrine. *See e.g.*, *Surinach* v. *Pesquera de Busquets*, *supra*, 604 F.2d at 76-78.

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[36] *See* Ala. Exh. A at ¶¶ 78-85 (Ala./Nev. J.A. 66-72); Nev. Exh. A at ¶¶ 39-47 (Ala./Nev. J.A. 101-08).

Each of the types of excessive entanglement caused by the interpretation of section 3309 adopted by the Secretary of Labor and accepted by the Supreme Court of South Dakota represents a serious intrusion upon the quarantees of the Religion Clauses of the First Amendment and would in itself be fatal to the Secretary's interpretation. However, this Court need not consider each of these types of entanglement in isolation. In determining the constitutionality of the Secretary's interpretation, the "cumulative impact of the entire relationship" between church and state must be measured. *Lemon* v. *Kurtzman, supra,* 403 U.S. at 614. It is evident that the cumulative impact of the entire relationship created by the extension of unemployment compensation laws to church schools as required by the Secretary is a comprehensive, continuing, and active state surveillance of, and involvement in, church affairs. The First Amendment forbids such a result.

CONCLUSION

The interpretation of section 3309(b)(1) of FUTA endorsed by the Supreme Court of South Dakota flatly ignores the plain language of the statute, has no support in legislative history, and transgresses fundamental constitutional guarantees. The State of Alabama and the State of Nevada accordingly request this Court to reject the Secretary of Labor's interpretation of FUTA and to reverse the decision of the Supreme Court of South Dakota.

Respectfully submitted,

CHARLES A. GRADDICK
Attorney General
GEORGE COCORIS
Department of
Industrial Relations
649 Monroe St.
Montgomery, Alabama
36130

Attorneys for
State of Alabama

RICHARD H. BRYAN
Attorney General
JOHN A. FLANGAS
333 California Ave.
Reno, Nevada 89509

Attorneys for
State of Nevada

STUART PHILIP ROSS
PETER W. TREDICK
ALLEN R. SNYDER
PATRICIA R. AMBROSE
HOGAN & HARTSON
815 Connecticut Ave., N.W.
Washington, D.C. 20006
(202) 331-4500

Attorneys for States of
Alabama and Nevada

CERTIFICATE OF SERVICE

I hereby certify that three copies of the foregoing Brief of the States of Alabama and Nevada as Amici Curiae in Support of Petitioners were served this 18th day of December, 1980, by mail, postage prepaid, on Edward Thomas Schilling, Esq., 757 North Broadway, Suite 500, Milwaukee, Wisconsin 53202, counsel for Petitioners; Judith A. Atkinson, Esq., Assistant Attorney General, Office of Attorney General, State Capitol, Pierre, South Dakota 57501, counsel for Respondent; and Wade H. McCree, Jr., Solicitor General, Department of Justice, Washington, D.C. 20530, counsel for the United States as amicus curiae.

ALLEN R. SNYDER